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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BERNARD WARD and T. FURIHATA,

Plaintiffs-in-Error,

vs.

UNITED STATES OF AMERICA,

Defendant-in-Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF WASHINGON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF-IN-ERROR BERNARD WARD.

JOHN F. DORE,
F. C. REAGAN,
Seattle, Washington,
Attorneys for Plaintiff-In-Error.

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STATEMENT.

The plaintiff-in-error, Bernard Ward (named in the information as Bernard Shaw), together with one Emil Hoffman and T. Furihata, was tried on an information containing three counts.

In the first count it was charged that "said defendants did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to-wit: 27 bottles each containing one-fifth gallon of a certain liquor known as whisky, 13 pints of a certain liquor known as whisky, 60 pints of a certain liquor known as distilled spirits, 17 quarts of a certain liquor known as beer, and 4 bottles each containing one-fifth gallon of a certain liquor known as gin, * * * then and there containing more than one-half of one per cent of alcohol by volume, and then and there fit for use for beverage purposes, * * * intended then and there by said Emil Hoffman, Bernard Shaw (Ward) and T. Furihata for use in violating * * * the National Prohibition Act, by selling, bartering, exchanging, giving away and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said Emil Hoffman, Bernard

Shaw (Ward) and T. Furihata, as aforesaid, was then and there unlawful and prohibited by * * * the National Prohibition Act."

In the second count all of the defendants were charged with the sale, on the 17th day of August, 1922, of two bottles each containing one-fifth gallon of a certain liquor known as whisky.

In the third count all of the defendants were charged with maintaining on the 17th day of August, 1922, at 608 Second Avenue, Seattle, Washington, a common nuisance.

After a trial by jury the defendant Bernard Ward was found not guilty on Count I, guilty on Count II, and not guilty on Count III. In other words, the jury found by their verdict that the said defendant did not possess the two bottles of whisky on August 17, 1922, that he soild, which was described in Count I of the indictment and included in the 27 bottles "each containing one-fifth gallon of a certain liquor known as whisky."

ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the motion for new trial herein.

II.

The court erred in overruling the motion in arrest of judgment herein.

III.

The court erred in failing to set aside the verdict rendered in this cause, for the reason that the same is inconsistent in that the defendant was by the verdict found guilty of selling liquor which the jury found by their verdict that he did not possess with intent to sell.

IV.

Thereafter, and within the time limited by law and the order and rules of this court, said defendant moved for a new trial, which said motion was overruled by the court, and an exception allowed, which ruling of the court the defendant now assigns as error.

V.

Thereafter, and within the time limited by law, the defendant moved the court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the court and an exception allowed

the defendant, and the defendant now assigns as error the overruling of said motion.

VI.

The court erred in overruling the motion in arrest of judgment entered herein.

VII.

The court thereafter entered judgment and sentence against said defendant, upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, and now the defendant assigns as error that the court so entered judgment and sentence upon the verdict.

VIII.

The defendant took timely and proper exception to the following instruction:

> "If the defendant Ward is guilty in this case it is upon which he did that day, his conduct in operating the elevator, his relation to the transaction between Hoffman and the agents who bought it, and what, if anything, he said to the operators when they came there for the purpose of purchasing it. He said he did nothing except to operate the elevator as a favor, which he did sometimes. The Government witnesses testified that they asked Ward for some whiskey or some liquor, and he said,

'We haven't that,' and you remember what their testimony was, and if he did actively participate in the operation of the elevator, and carried these parties up and was conscious of what was transpiring, and did it in the advancement of a sale between the parties participating in it, and did use the conversation and statements that I have indicated, directing or suggesting some other brand instead of that which was demanded, and actually participated in the transaction and closing of the sale, why then he would be guilty of sale, and likewise, of possession. If that was the only connection the defendant Ward had with relation to the matter you would not be warranted in finding the defendant Ward guilty of the nuisance count, because that transaction alone, of itself, would not be sufficient to find the defendant Ward guilty of a nuisance, but would be sufficient to find him guilty of possession and of sale."

IX.

The defendant took proper and timely exception to the following instruction:

"A person may make a sale and not be in possession, by bringing the parties together, or being a party to bringing the parties together, and at the sale, and participating himself in carrying out the transaction, and not be in the possession of the liquor himself, it being elsewhere in the possession of some other party, he could be a party to a sale and not be in possession."

ARGUMENT.

Gordon B. O'Hara, a witness for the Government, testified that he was a federal prohibition agent on August 17, 1922; that he went to the New Avon Hotel, 608 Second Avenue, Seattle, Washington; that the defendant Hoffman was at the desk; that he asked him if he could get a drink of whiskey; that Hoffman took him to room 606, served him a drink, for which he paid fifty cents. He further testified that he went back to the prohibition office and secured a search warrant and, with Agent Justi, went to the hotel about 4:30; that Hoffman came down in the elevator; that he told Hoffman he wanted to get some liquor; that Ward was sitting in the lobby, reading a paper; that Hoffman got in the elevator and, as it was starting up, called to Ward to get in the elevator; that the witness and Justi got out of the elevator on the second floor and the elevator "went upstairs"; that in three or four minutes Ward met them on the second floor and told them to go into the parlor, room 204; that Hoffman returned shortly with Exhibits 1 and 2, for which the witness handed Hoffman $20 in marked money. Hoffman was then arrested. He testified that Ward was not present when the

whiskey was delivered; that later on he saw Ward standing in the lobby of the hotel, where he arrested him; that Ward denied ownership of the liquor.

On cross-examination O'Hara testified that Hoffman was the hotel clerk and that he knew that Ward was manager of the Rainier Taxicab Company, which had a switchboard and office in the hotel building (Tr. 16-7).

Walter M. Justi, a Government witness, testified that he went to the New Avon Hotel with O'Hara; that Ward was sitting in the lobby when he and O'Hara stepped in the elevator; that Hoffman was the operator; that he called to Ward; that Hoffman took O'Hara and the witness up to the second floor; that O'Hara told him he wanted some whiskey; that the witness and O'Hara got out on the second floor and Hoffman operated the elevator to some upper floor; that Ward later saw them on the second floor and told them to go into room 204, where Hoffman came in and handed O'Hara two bottles; that O'Hara handed Hoffman $20 and the witness arrested him; that Ward was not present at the time of the sale (Tr. 17-8).

Motion for a directed verdict on each count, on behalf of the defendant Ward, was made at the close of the Government's case. The motion was denied as to each count and an exception was allowed (Tr. 19).

The plaintiff-in-error Ward testified that he was the manager of the Rainier Taxicab Company, which had an office in the lobby of the New Avon Hotel; that said company had approximately thirty drivers; that on the day in question he was operating the switchboard over which calls were received for cabs and reports from the drivers; that the hotel is a small one and the clerk acts as operator of the elevator and bell boy; that it is customary for employees of the cab company to help out on the elevator when the clerk is "rooming" guests; that when the clerk takes guests up to their rooms the employees of the cab company would run the elevator for the convenience of other guests; that the witness had done it thousands of times; that he had no connection in any way with the hotel; that on the day in question he was standing at the switchboard, reading a newspaper; that Hoffman called him and asked him if he would run the elevator; that he went up to the second floor; that Hoff-

man and the two men got out; that Hoffman got back in the elevator and asked him if he would run it down, and the witness said he would; that Hoffman went up to the third floor, got out of the elevator, and just then the bell rang and Hoffman went back to the office floor; that he ran the elevator down to the first floor, where there were three or four people waiting; that Hoffman started to "rooming" the people and asked him if he would go up to the second floor and tell the two gentlemen he had left on the second floor to step into the parlor and he would be back in a few minutes; that he went up and met Agents Justi and O'Hara and told them that Hoffman said to ask them to step in the parlor and he would be back in a few minutes; that was all the conversation he had with them. He also testified that he did not live in the hotel; that he never sold any liquor; that he was married and lived with his family on Lakeview Boulevard; that his only connection with the hotel was that the Rainier Taxicab Company had its office there. On cross-examination he testified that he ran the elevator sometimes ten, fifteen or twenty times a day; that on the day in question he simply rode up in the elevator and back down with Hoffman; that he got out of

the elevator when it reached the bottom; that Hoffman asked him to go up and tell the people on the second floor to step into the parlor; that he walked up the stairs to the second floor and me the two men, told them that the clerk was busy and would be back in a few minutes; that nothing was said about liquor by any one (Tr. 19-22).

Emil Hoffman, one of the defendants, testified that he made the sale of liquor to O'Hara and the other agent and got $20 for it; that he was arrested; that the defendant Ward had no interest in the liquor or in its sale; that he made it himself; that he made a sale earlier in the day, in room 606; that he asked the defendant Ward to run the elevator a few minutes; that he got in the elevator and went up to the second floor; that he got out with O'Hara and Justi; that they asked him for a bottle of scotch and a bottle of bourbon; that he got back into the elevator and went to the third floor; that just then the bell rang and, thinking it was some one wanting a room, he went down again; that while he was registering the people he asked Ward to go up and tell the two men on the second floor to go into the parlor and wait there for him; that in about ten minutes he went back up in the elevator,

got two bottles of whiskey, brought it back and delivered it to the agents and took the money. He testified that no one was in the room besides himself and the agents when he made the sale. On cross-examination he testified he was still working at the New Avon Hotel, as clerk and bell boy; that he was employed by the defendant Furihata; that he went up in the elevator with O'Hara and Justi and got out with them on the second floor; that they asked him for some bourbon and scotch; that he told them he had no bourbon; that he went up to the second floor and the bell rang and he went down to the office, and while he was waiting on the people he asked Ward to go upstairs and tell the two men on the second floor to go into room 204, that he would be there in a little while; that after he got through registering the people he went up to 402 and got two bottles, brought them down to the second floor and delivered them (Tr. 22-24).

Motion for directed verdict on each count as to the defendant Ward was renewed at the close of the testimony. The motion was again denied and an exception allowed (Tr. 24).

I.

An examination of the evidence will show that the plaintiff-in-error Ward was the manager of the Rainier Taxicab Company, which had its office and switchboard in the lobby of the New Avon Hotel; that the defendant Hoffman was the hotel clerk and in this connection ran the elevator; that plaintiff-in-error Furihata was the lessee of the hotel. The evidence further discloses that the only connection this plaintiff-in-error had with the hotel, in addition to having his office there, was that at times he and other employees of the taxicab company would run the elevator for the clerk when he was busy.

The Government witnesses did not testify that they ever had any agreement with Ward or that Ward ever assented by word or deed to the sale of liquor. There is no evidence of any agency shown between Ward and the other defendants. There is a total lack of evidence showing that Ward had any knowledge of what O'Hara and Justi were doing in the hotel on that day, or what their business with Hoffman was.

It is the contention of this plaintiff-in-error, on the face of the record, that there is no evidence

upon which this verdict of guilty as to the sale of liquor could be based as against him.

In *Scoggins vs. United States,* 255 Fed. 825, speaking on this question, the Circuit Court of Appeals for the Eighth Circuit said:

> "But it is indispensable to the maintenance of this verdict and judgment that there should have been substantial evidence of a sale or of an offer to sell som eof the whiskey by the defendant.
>
> " 'A sale is a contract for the transfer of property from one person to another for a valuable consideration.' 7 Words and Phrases, 'Sale,' pp. 6291, 6292.
>
> " 'To constitute such a sale there must be the assent of the two parties; there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the penalty of the law, can avail them, if in truth such sale is found to have taken place.' *Commonwealth vs. Thayer,* 49 Mass. (8 Metc.), 525, 526.
>
> "But one party cannot make a contract of sale. No such contract can be made without assent of the minds of two parties at the same time to the sale and to the terms of the sale, to the subject-matter and the consideration of the sale; and as the alleged contract here was ille-

gal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction."

In re. Iowa, 110 U. S. 471, 28 L. ed. 200:

"A sale, in the ordinary meaning of the word, is a transfer of property for a price."

Williamson vs. Berry, 8 Howard 495.
McNutt vs. United States, 267 Fed. 670.
Commonwealth vs. Davis, 75 Ky. 241.
Cooper vs. State, 35 Ark. 412.

Under the above authorities there is no evidence upon which the verdict of the jury that the defendant Ward was guilty of making a sale can be based. The jury by their verdict on Count I found that he did not possess the liquor that by their verdict on Count II they say he sold. In other words, the jury found by their verdict on Count I that Ward had no dominion or control over this liquor. There is no proof that he had an agreement for its transfer or that he was interested in it in any way; no proof that he assented to the sale, and no proof that he

ever knew about it until his arrest.

The Government's evidence is that he was not present when it was made; it is admitted that he ran the elevator and delivered a message to the agents, but this falls short of proof that he made a sale. His evidence and the evidence of Hoffman stands uncontradicted that as an accommodation he often ran the elevator. This fact and the fact that he delivered Hoffman's message to the agents is the only evidence by which the Government attempts to tie Ward to this transaction—facts that are just as consistent with innocence as guilt.

Taken in connection with the plaintiff-in-error's testimony that he made no sale, had no interest in it, knew nothing about it, and with Hoffman's testimony that he made the sale and that Ward had nothing to do with it and no interest in it—this evidence falls short of showing a sale on the part of Ward.

This plaintiff-in-error is charged as a principal. The Government will probably contend that under Section 10506 Comp. Stat., he is a principal. However, that section requires proof that he *knowingly* aided and abetted; and unless there is evidence that

he had knowledge of the offense, he cannot be a principal. There is no such proof here.

Rizzo vs. United States, 275 Fed. 51.

II.

By Count I of the information this plaintiff-in-error was found not guilty of possesing the liquor that the jury found him guilty of selling under Count II.

It is the contention of this plaintiff-in-error that the verdict is repugnant and void for inconsistency; that a man cannot be guilty of selling liquor and innocent of possesing the identical liquor with the intention of selling the same.

In the case of *Rosenthal vs. United States,* 276 Fed. 714, this court held that where one count of an indictment charged a defendant with having bought or received stolen property, with knowledge that it was stolen, and another count charged him with having the same property in his possession with like knowledge, were based on the same transaction, and the evidence showed only one transaction, a verdict finding the defendant not guilty on the first count and guilty on the second count was

wholly inconsistent and required a reversal. In that case the court says, at page 715:

> "The difficulty is that there was but one transaction involved in the two counts of the indictment, which was based upon the statute mentioned, and, according to the evidence, but one transaction between the plaintiff-in-error and the thieves. By its verdict upon the first count of the indictment the jury found that the plaintiff-in-error neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count that the plaintiff-in-error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting."

In the case of *Baldini vs. United States,* 286 Fed. 133, this court, referring to the *Rosenthal* case with approval, said:

> "Counsel for the Government rightly concede that, if the two counts related to the same transaction, the position taken on behalf of the plaintiff-in-error is valid" (p. 134).

A case exactly in point is *Kuck vs. State,* 99 S. E. 622. It will be seen that the *Kuck* case is a case where the defendant was found guilty of selling liquor. Quoting from the decision:

> "The offense of having, controlling, and possessing spirituous liquors in this state, as alleged in the second count, could be committed

without making a sale of the spirituous liquors; but the offense of selling, which contemplates delivery within the meaning of the prohibition statutes as the culminating feature of the sale, could not be committed without having, controlling, or possessing liquors. There would be no inconsistency or repugnancy in the verdict of guilty under the second count and not guilty under the first count, but there would be inconsistency and repugnancy in a verdict of guilty under the first count and not guilty under the second count; for, if there were no 'having, controlling, or possessing,' there could be no 'selling.' In the latter instance the repugnancy is as complete as in the case of *Southern Ry. Co. vs. Harbin,* 135 Gar. 122, 68 S. E. 1103, 30 L. R. A. (N. S.) 404, 21 Ann. Cas. 1011, where on acount of repugnancy a verdict was set aside. The verdict found damages against the railroad and no liability against its employe in operating the engine of the company."

2 *Bishop New Criminal Procedure, sec.* 1015a (5):

"No form of verdict will be good which creates a repugnancy or absurdity in the conviction."

16 *Corpus Juris,* sec. 2596-5:

"A verdict on several counts must not be inconsistent."

Other examples of where inconsistent verdicts were not allowed to stand are:

Commonwealth vs. Haskins, 128 Mass. 60.
State vs. Rowe, 44 S. W. 266. (Mo.).
Toben vs. The People, 104 Ill. 565.
Southern Ry. Co. vs. Harbin, 68 S. E. 1103 (Ga.).

Sipes vs. Puget Sound Electric Co., 54 Wash. 55.

Doremus vs. Root, 23 Wash. 710.

In *Woods vs. United States*, 290 Fed. 957, the principle that we are contending for is recognized by this court. In that case this court decided that a druggist could lawfully possess liquor, but a sale of that liquor was unlawful under the facts. There is no such question in this case.

It is a conceded fact that Exhibits 1 and 2, the liquor charged by the government to have been sold under Count II, was a part of the liquor which it was claimed by the government the parties possessed under Count I. What could be more repugnant and inconsistent? A simultaneous finding is made that the defendant did not possess the identical liquor he sold with intent to sell it. Sale is an indication of possession.

III.

The court gave the following instruction as set out in Assignment VIII:

> "If the defendant Ward is guilty in this case it is upon what he did that day, his conduct in operating the elevator, his relation to the transaction between Hoffman and the agents who bought it, and what, if anything, he said to the operators (38) when they came there for the purpose of purchasing it. He said he did nothing except to operate the elevator as a favor, which he did sometimes. The Government witnesses testified that they asked Ward for some whiskey or some liquor, and he said, 'We haven't that,' and you remember what their testimony was, and if he did actively participate in the operation of the elevator, and carried these parties up and was conscious of what was transpiring, and did it in the advancement of a sale between the parties participating in it, and did use the conversation and statements that I have indicated, directing or suggesting some other brand instead of that which was demanded, and actually participated in the transaction and closing of the sale, why then he would be guilty of sale, and likewise, of possession. Lf that was the only connection the defendant Ward had with relation to the matter you would not be warranted in finding the defendant Ward guilty of the nuisance count, because that transaction alone, of itself, would not be sufficient to find the defendant Ward guilty of a nuisance, but would be sufficient to find him guilty of possession and of sale."

This instruction is bad for the reason that the record does not disclose that there was any testimony that government witnesses "asked Ward for some whiskey or some liquor and he said 'We haven't that' * * *," and again there is no evidence to sustain that part of the instruction that he suggested some other brand. There is no evidence in the record to justify such an instruction—the entire instruction is based on the implied assumption that what Ward did on that day, his conduct, and running the elevator was assisting in consummating a sale. The evidence does not justify such an instruction on his conduct. The jury should have been told that if his conduct was just as consistent with innocence as guilt he would not be guilty.

IV.

The court gave the following instruction as set out in Assignment of Error IX:

> "A person may make a sale and not be in possession, by bringing the parties together, or being a party to bringing the parties together, and at the sale, and participating himself in (39) carrying out the transaction, and not be in the possession of the liquor himself, it being elsewhere in the possession of some other party, he could be a party to a sale and not be in possession."

This was error, as there is no evidence in the case that any one brought the parties together. The Government's testimony is that O'Hara knew Hoffman, had bought liquor from him and went down to the hotel that day to buy from Hoffman, and did buy from him.

Likewise it is bad for the reason that there is no evidence in the record that any one participated in or carried out the sale except the defendant Hoffman.

For errors asisgned herein, the motion in arrest of judgment should be granted or, in the alternative, a new trial should be ordered.

Respectfully submitted,

JOHN F. DORE,

F. C. REAGAN,

Attorneys for Plaintiff-in-Error.